BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAYLEIGH DAVIS	)	
Claimant	)	
	)	
VS.	)	
	)	
PIZZA HUT	)	
Respondent	)	Docket No. 1,059,294
	)	
AND	)	
	)	
INSURANCE CO. OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 16, 2012, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Tamara J. Collins, of Wichita, Kansas, appeared for claimant. Vincent Burnett, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained an accidental injury that arose out of and in the course of her employment with respondent. Respondent was ordered to furnish the names of two physicians for selection of one by claimant for authorized treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 16, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent asserts that claimant did not sustain a personal injury that arose out of and in the course of her employment and asks the Board to reverse the Order of the ALJ.

Claimant contends she met her burden of proving by a preponderance of the credible evidence that she suffered an injury that arose out of and in the course of her employment at respondent. Accordingly, she asks that the ALJ's Order be affirmed.

The issue for the Board's review is: Did claimant sustain an injury by accident that arose out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant began working for respondent as a crew member and server in February 2011. She testified that on or about December 17, 2011, she was deck scrubbing (scrubbing floors) when her left knee popped. Carley Dotson, one of respondent's managers, was present at the time, and claimant told Ms. Dotson her knee popped. Claimant testified she did deck scrubbing every day she worked at respondent. This task requires her to put a chemical on the floor and then scrub the floor with a push broom with bristles on it. Claimant has not done any deck scrubbing since December 17, 2011.

Claimant said an accident report was completed on January 6, 2012, but she was not sent to a doctor by respondent. Claimant, on her own, went to Hunter Health Clinic (Hunter) on December 20, 2011. Claimant said she was not treated at Hunter but was only told to take Ibuprofen. The medical records from Hunter indicate claimant gave a history of falling down two steps three days earlier.[1] The history goes on to state that she bumped her left knee, and the knee had been painful ever since. The history also stated that claimant "denies any locking/popping of the joint, no inability to bear weight. [S]he has been wearing a knee brace, which seems to help."[2] On direct examination, claimant testified she did not tell the personnel at Hunter that she had fallen. Claimant testified to the contrary on cross-examination:

> Q. [by respondent's attorney] Do you have any explanation today why your medical provider, Hunter Health Clinic, would reflect that you gave them a history that you had fallen down steps three days before this visit?
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> A. [by claimant] Yes, I do. I told them I did because I didn't want to have to do this and lose my job.
>
> Q. So you are telling me that you lied to Hunter Health then?
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> A. Yes, I did.
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> Q. Or you are lying today?
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> A. If that's what you believe, yes, could be.[3]

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[1] Claimant said there are no steps at work, but there are steps at her home.

[2] P.H. Trans., Resp. Ex. 1 at 15.

[3] P.H. Trans. at 19.

Claimant said she lied to the Hunter personnel because she was afraid she would lose her job at respondent if she reported her knee injury because the job requires her to stand and walk all day. She said her ex-boyfriend was hurt at work and filed a claim, but he lost his job after he was given restrictions that precluded him from being able to perform his job.

Again on her own, claimant went to Wesley Medical Center (Wesley) emergency room on December 22, 2011, where she complained of a painful left knee with a popping sensation with an onset of five days. The medical records indicate she gave a history of "no known injury to the site."[4] The Wesley medical records indicate she was diagnosed with internal derangement of left knee. Claimant testified she was told she either tore tendons or had a muscle sprain and was given a knee immobilizer and pain medication. She was told if it was a muscle strain, it would go away on its own, but she still has pain. She continues to wear the knee immobilizer because it helps.

Claimant testified she continues to have a stabbing pain in her left knee and a pulling of muscles. She testified that her hours have been cut at respondent because the manager knows she is in pain.

Claimant had previous problems with her left lower extremity in the summer of 2011, for which she was treated at Hunter. The records at Hunter for June 24, 2011, indicate claimant did not remember a specific injury "other [than] running into a safe, but foot has progressively become more swollen, redden, edematous and sore."[5] Claimant apparently did not follow up well with either her medications or visits to Hunter. Her last appointment at Hunter for her left foot problem was in October 2011, at which time she was still complaining of swelling, redness and pain. She stated at times her left leg changed color from deep purple to red. On October 20, 2011, claimant called Hunter and complained that her foot was turning blue and her left leg was completely numb. She was advised to go to the emergency room. Claimant said she did not follow up with any medical treatment. Claimant testified she was not having problems with her left foot in December 2011.

Chad Skinner testified that he is the manager of the Pizza Hut where claimant works. He testified that one day in December 2011, claimant appeared for work and he noticed she had a limp. Mr. Skinner asked her what happened, and claimant told him she had hurt her knee when she fell down some stairs at her home. Claimant did not claim she had hurt her knee deck scrubbing. He could not remember when she reported the work-related injury to him, but it was in either December or January, whenever he filled out the accident report. Mr. Skinner could not think of a good reason why claimant would be afraid to report an on-the-job injury. He considered her to be a good employee.

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[4] P.H. Trans., Cl. Ex. 1 at 6.

[5] P.H. Trans., Resp. Ex. 1 at 1.

Carley Dotson is employed by respondent as a shift manager, and claimant works the shift she manages. She testified that sometime in December 2011, claimant was deck scrubbing, which Ms. Dotson described as strenuous work requiring use of one's upper body. Claimant told Ms. Dotson that she felt a pop when she was scrubbing the floor. Ms. Dotson testified:

> She did inform me that she felt a pop when she was scrubbing a floor. It was really close to closing time so I told her when she was done we could get her out of there. I remember her saying she fell. I didn't report it, I didn't file a claim . . . .[6]

Ms. Dotson also testified that she saw claimant limp and heard a rumor around the store that claimant had fallen down some stairs, but claimant never directly communicated this to her.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
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> . . . .
>
> (f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

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[6] P.H. Trans. at 37-38.

> (3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

The issue concerning whether claimant sustained injury to her left knee in an accident that arose out of and in the course of her employment with respondent is essentially a question of credibility. That is, whether the injury occurred while claimant was scrubbing floors at work, as claimant described and which is supported in part by Ms. Dotson's testimony, or instead whether the injury resulted from a fall down stairs somewhere other than at work, as Mr. Skinner testified and which is supported by the Hunter Health Clinic's record.

While Ms. Dotson acknowledges that claimant reported her knee popped while mopping the floor, claimant did not say she was injured or that she needed medical treatment. Ms. Dotson said she did not understand claimant to be reporting a new injury. Rather, she believed claimant was talking about something that was related to her non-work related fall that Ms. Dotson had heard about. That claimant's knee injury was due to a fall from stairs is supported by what claimant admittedly told the Hunter Health Clinic and by what claimant told her manager, Mr. Skinner, when he asked about her limp. Claimant's belated story about her injury occurring at work is not credible. Claimant's credibility is further compromised by the fact that she at first said she was truthful about the information she gave the Hunter Health Clinic and denied telling the Hunter Health Clinic the history that she injured her knee when she fell from stairs. Only upon cross-examination did claimant admit she gave that history to Hunter Health Clinic, but she added that it was a

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2011 Supp. 44-555c(k).

lie. Claimant likewise failed to give Wesley Medical Center emergency room a history of an accident at work or of her knee popping while mopping or cleaning floors.

This Board Member finds claimant has failed to meet her burden of proving her injury is due to a work-related accident.

CONCLUSION

Claimant's knee condition and need for treatment is not the result of an accident that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated February 16, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
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John D. Clark, Administrative Law Judge